United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

131

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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,532

UNITED STATES OF AMERICA, Appellant

v.

ERNEST M. GREELY, APPELLEE

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. 1136-68

I N D E X

TABLE OF CASES

III

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

1. Whether the trial court's finding of fact that appellee was unlawfully arrested on May 2, 1968, based upon a determination of witness credibility, is subject to reversal by an appellate court upon the cold record.

2. Whether the trial court's written order of September 3, 1968, suppressing in-court identifications because of a finding that these identifications were the fruit of appellee's unlawful arrest in addition to a due process violation, which tainted identifications were found not to have been dissipated by the Government in discharging its burden of proof, was supported by the record, viewing the latter in the light most favorable to appellee.

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*This case has previously been before the Court in No. 22,859, United States v. Ernest M. Greely, decided May 27, 1969. Motion to dismiss the Government's appeal for want of jurisdiction granted per Circuit Judges Wright, McGowan and Robinson.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,532

UNITED STATES OF AMERICA, Appellant

v.

ERNEST M. GREELY, Appellee

APPEAL FROM UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

I. Preliminary Statement

The defendant-appellee stands indicted for felony murder and associated crimes growing out of the killing of a liquor store owner, one Benjamin Brown, during the attempted robbery of the latter's place of business on April 30, 1968. A motion to suppress eyewitness identifications was heard by Judge June L. Green on August 30, 1968, at the conclusion of which she orally granted the defense motion. A written order of suppression was entered by the court on September 3, 1968. On September 30, 1968, the United States filed a notice of appeal

under the new amendment to 18 U.S.C. §3731, i.e., 82 Stat. 237, which authorized this interlocutory appeal. The defendant was released on his personal recognizance by the trial court and is presently still so enlarged.

II. Summary of the Suppression Hearing Testimony. /1

1. John Henry Scott.

Mr. Scott testified that while he normally worked at the liquor store herein concerned, he was not working on the day of the murder. At about 4:25 p.m. however, he was in the vicinity of the store when he observed a group of "[a]bout 15, 19 guys" walking in its direction. (Tr. 30-32) The group was mixed between adults and youngsters. After he saw what was inferably this same group congregating in the front of the store he decided to walk over and see what, if anything, was occurring. /2 (Tr. 32-33) Upon walking inside the doorway (Tr. 33) he saw close to twenty people "just jumping up and down making a lot of noise, some of them, you know, like kids just climbing all over the counter...." (Tr. 35) At that time Mr. Scott was surveying the whole scene, without paying attention to anyone in particular. Within

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/1 "Tr." references are to the suppression hearing transcript dated August 30, 1968, pps. 1-158. All eight witnesses were called by the defense and accordingly, the direct examinations were conducted by defense counsel with cross being reserved to government counsel.

/2 Mr. Scott's interest was, no doubt, induced by the (cont'd.)

two to three minutes of his arrival his attention was attracted to the counter by a shot followed by three or four more shots. Prior to this he really had not noticed the gunman as "[t]here was some more people, you know, between me and him; as a matter of fact quite a few between me and him." (Tr. 36) After the first shot, everybody started running out of the store past Scott and he observed what was an exchange of gunfire between the decedent and his killer. (Tr. 37) During the actual shooting Mr. Scott saw the gunman from a sideview. As the group of about twenty persons scrambled out of the door Mr. Scott was forced to remain inside the doorway by this surge of people which took about one minute. Because of the exchange of gunfire, the killer was the last man to pass by this witness, brushing the latter's shoulder as he exited. Scott estimated the time at approximately one minute from the point at which he had heard the first shot until the gunman fled. (Tr. 33-35, 38) Although not clearly stated in the record, it is fair to draw therefrom that the witness got a full view of the gunman as the latter ran from the counter to the

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/2 (cont'd.) then recent ravaging of a large part of Washington following the assassination of Dr. Martin Luther King. The store itself was located at 1100 9th Street, N. W., in the District of Columbia.

doorway. According to Scott, he had never seen the gunman before the shooting (Tr. 58), there was nothing unusual about the man's face (Tr. 40), he did, however, have a heavy mustache (Tr. 40), wore no sunglasses (Tr. 40): and could only remember that he wore a hat and a black coat. (Tr. 41) At the hearing the defendant was called to within five or six feet of the witness for the latter to view him. The witness estimated his height as five feet, eight inches tall. (Tr. 41-42) At the hearing the defendant testified that his actual height was five feet, nine inches. (Tr. 127) A copy of the P.D. form 251 was shown to the witness for examination and he testified that he "could have" told the responding officers that the assailant was about five feet, six inches tall. (Tr. 43-44).

At the time of the shooting a fellow employee named David Crump was behind the counter standing near the decedent, apparently waiting on a customer. (Tr. 44-45) The day following the shooting, May 1, 1968, Mr. Scott along with Mr. Crump and detectives from the homicide squad were cruising the area of the crime in Crump's car looking for suspects. One boy, about 13 or 14 years of age, who had been in the store was picked up, questioned, and apparently let go. No other suspects were seen that day. (Tr. 45-47) The following

day, May 2, 1968, at about noon, Mr. Scott and Mr. Crump were again in a car near the site of the crime on the way to Mr. Brown's funeral. Both subjects were riding around with their "eyes open" still looking for suspects as they had done the day before when with the police. (Tr. 48) While so travelling they spotted a man identified as the defendant standing on the corner of Ninth and P Streets, N. W., along with five or six other adults. He was wearing -- according to the witness -- a black coat, but none of the other clothing worn by the assailant two days earlier. The defendant had a heavy mustache although the witness couldn't recall whether any of the others with him at the time also had heavy mustaches. After stating that he was not sure of the identification, he and Crump decided to come back and get a second look. When they shortly returned however, the man was gone. Still pushing on to the funeral they spotted the same man on the corner of Ninth and N Streets, N. W. Mr. Scott had absolutely no idea how much time had elapsed between the first and second viewing other than to state that it "couldn't have been toc long." There were still five or six people near him. On both occasions the groups were <u>standing still</u> when seen. (Tr. 49-53) Scott did not recall whether anyone else in the group had a heavy mustache, or how they were dressed. (Tr. 53) He

described the relevant man on the corner -- identified in court as the defendant -- as then wearing a gold sweater, black coat and rust colored cap; a cap dissimilar to the one worn by the assailant. (Tr. 54) Now being more certain, they telephoned for the police. They were met by uniformed officer Thomas F. Minogue, who alone drove Scott and Crump around the streets in a scout car looking for the suspect. (Tr. 87-89, Officer Minogue's testimony.) Officer Minogue was brought into the courtroom while Scott was testifying solely for the purpose of having the latter look at him. (Tr. 57-58) After so viewing him Scott testified, "He don't look like the man that I rode with." (Tr. 59) A vehicular pass by Ninth and N Streets, N. W. proved negative. The witness estimated that thirty minutes had elapsed before they had secured the services of the policeman to resume their scan of the area. This time the witness spotted the suspect -- identified as the defendant -- <u>standing</u> with six or seven others on the corner of Tenth and N Streets, N. W., still dressed the same way. (Tr. 55-57) After pointing the suspect out to Officer Minogue, "we passed him right by and he took us back to the car, so we got in the car and went on to the funeral." (Tr. 57) The witness saw no further confrontation between the suspect and the police. The next day Mr. Scott went to Goldsboro, North Carolina to visit some people, where

he was met by a Metropolitan police officer who showed him some photographs. Before viewing the photos he was told by the policeman that "he was going to show me some pictures of the man that me and Crump pointed out to this officer." (Tr. 60)

> "Q. Now at that point did you think in your mind you were going to see pictures of the man that did the shooting? Is that right?
>
> A. I guess so." (Tr. 60)

Mr. Scott was then shown several polaroid color shots of Ernest M. Greely, and of no one else. (Tr. 61) Prior to testifying on August 30, 1968, the witness had never seen Greely in a lineup, nor had the police ever given him Greely's picture to identify along with other similar appearing men. (Tr. 61-62)

2. Detective Fred O. G. Egbers

Detective Egbers testified that in early May of 1968, he was scheduled to be on vacation in Goldsboro, North Carolina and was asked by a homicide squad detective to show Mr. Scott two photographs of a suspect. On May 3, 1968, he saw Scott and showed him the two photographs -- both of Ernest M. Greely -- as they stood on the sidewalk in front of a motel at about 3:00 p.m. Prior to the viewing Scott was told -- according to Detective Egbers -- that "I was going to show him the

picture of a suspect in a homicide case." (Tr. 118-120)

3. Private Thomas F. Minogue

Officer Minogue testified that on May 2, 1968, he was in uniform driving a one-man scout car when he received a radio run to meet another police vehicle at Eighth and Q Streets, N. W. Upon his arrival he met Inspector Gooding along with Mr. Crump. He placed Crump in the car and drove to the 1500 block of Ninth Street, N. W. where he picked up Mr. Scott. The three of them proceeded to cruise the area in search of the suspect. As they proceeded he was advised that the man sought was a Negro male wearing some orange colored clothing, bright clothes. (Tr. 86-83, 90)

> "Yes, sir, it was orange clothes and orange hat, bright hat, army sweater and dark tan trench coat." (Tr. 90)
>
> * * * *
>
> "Q. Anything about his face -- anything unusual about his face?
>
> A. No, sir. They didn't give me any description at that time.
>
> Q. Any indication of a mustache?
>
> A. No, sir." (Tr. 90-91)

When the scout car reached Tenth and N Streets, N. W. he observed approximately ten Negro males standing on the northeast corner. One of them "had on a tan -- dark tan trench coat, rust colored sweater and rust colored hat." (Tr. 92) At that time both subjects said, "That's

the one there, in that bright sweater and with that hat and trench coat." (Tr. 92) The officer proceeded several blocks and let his passengers off because they didn't want to be seen with him. Minogue stated he saw the man for 50 to 60 seconds.

"Q. Was this a bright red or was it sort of rust color?

A. It was a rust colored sweater." (Tr. 93)

* * * *

"Q. And did the man have any mustache or anything?

A. He had a heavy mustache.

Q. You noticed that yourself.

A. Yes, sir.

Q. Heavy mustache.
Any glasses on?

A. No, sir, no glasses.

Q. No black raincoat?

A. He had a tan -- dark tan raincoat." (Tr. 94)

At that time the officer called for assistance and he was met by another one-man scout car. The second officer followed him to Tenth and N Street. At that time he saw the group walking north in the 1300 block of Tenth Street. He stopped his car alongside the group, walked over to the man later identified as Ernest Greely and asked for some identification. He walked Greely over to the car where the latter produced his identifi-

cation. According to the officer, no one else's identification was asked for. After he radioed in, a homicide cruiser arrived about two minutes later with Detective Cannon and two other officers. After the Homicide men arrived, they took over the investigation. (Tr. 95-97) Minogue "told Detective Cannon exactly what I had and gave him Mr. Greely's identification and he talked to Mr. Greely." (Tr. 98) Greely got in the cruiser with the Detectives and stated to the crowd that he was going to the Homicide office to talk with the police and that he was not under arrest.

> "Q. ....[H]e told the group 'I am not under arrest?' "
>
> A. Yes, sir" (Tr. 98)

4. James Apt Gassaway

Mr. Gassaway testified that on May 2, 1968, he was working for Pride, Incorporated soliciting people for authorization to remove junked cars from the area in question. Canvassing the neighborhood with him was co-worker Ernest M. Greely and about twenty other persons. While standing on the corner splitting the men up into working groups a uniformed officer came up and stated, "all you men that got identification show them." (Tr. 65) At about this time a second officer came up in a scout car and asked Gassaway, a fellow named Hill,

one named Payne and Greely for identification. Gassaway then, as at the hearing, had a heavy mustache as did Greely and the other men spoken to by the second officer. (Tr. 65-66) Gassaway did not show his identification nor did Payne, but Hill displayed his for the officer. About that time detectives arrived and stood in back of one of the patrol wagons. During this period one of the uniformed men was still speaking to Greely who was showing his i.d. when the detectives came up and said, "We don't want nobody but Greely." (Tr. 66-69) He was then placed in the Detectives cruiser and driven off. Prior to Greely's departure, he heard someone state, "Come on, come on, Greely." (Tr. 69) As best the witness could recall, it was after the officers had had a conference by their car that they came over and summoned Greely. (Tr. 74) The witness further stated that the officers did not physically put Greely in their vehicle, did not draw weapons, nor did they handcuff him; he had voluntarily submitted to their command. (Tr. 75, 76)

5. William Fulmore Bey

This witness testified that on May 2, 1968, he was supervising a Pride working force of twenty to twenty-five men, including Ernest M. Greely. All of the persons in his group were 21 years of age and older. He noticed a patrol wagon pass the group and suddenly

stop as it was joined by other police cars. He also observed some plainclothes detectives drive up and emerge from their car. (Tr. 78-79)

> "Well, by that time two officers who was in the patrol wagon had asked for some kind of identification and by this time two other workers had pulled out their identification cards, handed to the officer, and he went over them...."(Tr. 80)

Apparently, one of the cards handed over belonged to Ernest Greely. (Tr. 80) Bey asked the officer if he had a warrant, and when he learned the officer did not Bey left to call his superiors. When he returned he observed that two detectives had taken Greely to the side where they questioned him out of earshot. (Tr. 80) After a while Greely stated, "Like, man, I am going down, you know, with them, you know." (Tr. 80-81) Bey asked the officers if Greely was under arrest, but they did not answer him. (Tr. 81) He also heard one of the police officers remark about the similarity between the mustaches of Greely and Gassaway. (Tr. 82) "[T]he mustache was similar -- about being bushy." (Tr. 83) He also overheard one of the detectives telling another officer that he was from the homicide squad. (Tr. 33)

6. Detective John William Cannon

Detective Cannon testified that on May 2, 1968, he and fellow homicide squad detectives Robert M. Boyd and Bernard D. Crooke responded to the 1200 Block of

Tenth Street where they met Officer Minogue. The latter told him that while cruising with Scott and Crump there came a time when both witnesses pointed to a subject and stated, "That is the man." (Tr. 101) (Cf. Tr. 98 Wherein Minogue testified: "I told Detective Cannon exactly what I had....) Minogue then pointed -- according to Cannon -- to a subject standing in front of a group of from ten to twenty other persons. Cannon further testified that his attention then centered on Greely, but his impression was that the others in the group "were male Negroes, but in their very early teens....I say from 14 to 18." (Tr. 102) (Cf. Tr. 124 Wherein Greely testified that he was twenty-nine years of age.) Cannon did not remember whether any of these "teen-agers" had a heavy mustache as did Mr. Greely. Officer Cannon could recall nothing of Greely's dress at the time.

"Q. How was Greely dressed then?

A. I couldn't tell you. I don't remember." (Tr. 103)

Cf. Tr. 113-115 wherein Detective Cannon, however, upon request turned over to defense counsel in the Courtroom two polaroid pictures from his file of Ernest M. Greely taken on May 2, 1968, in the office of the homicide squad.

Cannon then advised Greely who he was and "that witnesses had pointed [Greely] out as the man being

responsible for the fatal shooting...." (Tr. 103) and asked him to accompany the officer to the latter's office to be viewed by these witnesses, i.e., to aid the police in investigating a possible murder charge against him; but also cautioning Greely, "that he was not under arrest." (Tr. 104) Greely, according to the officer, cooperated with him "said, yes, he would" (Tr. 104) and got in the back seat of the cruiser. In the back of the cruiser with Greely was Detective Boyd -- six feet three or four inches tall -- and Detective Crooke -- about six feet tall. At the time they departed Detective Cannon was of the impression that Scott and Crump were to meet them downtown. Cannon explained that he did not personally observe any identification and that he wanted to have Scott and Crump confront Greely in the officer's presence and to take additional statements from them "as to what had transpired from the time Officer Minogue had seen him until whatever transpired in the office." (Tr. 106 Emphasis supplied.) When asked why Greely was not arrested on the street, Cannon explained:

> "I am not trying to minimize the abilities of Officer Minogue in any way, but he is an experienced police officer, but he is not as experienced in Homicide investigations as I am, and he was not on the scene -- to my knowledge he wasn't on the scene the day of April 30, and I didn't think that he had the facts as well as I had them, and based on that I wanted Mr. Crump and Mr. Scott down there in my presence on May 2, while Mr. Greely was there." (Tr. 108)

After they arrived at the homicide squad office, Detective Cannon learned that the witnesses had gone to the deceased's funeral and probably would not be available for some time. After having verified Greely's residence and employment, Cannon told him "he was free to go." (Tr. 111) Greely left the office at 1:12 p.m. after having been there some 57 minutes. All during this period, insofar as the detective was concerned, Mr. Greely was free to go. During the period that Greely was in the office, Detective Cannon recalls a Mary Treadwell arriving along with several other persons who caused, according to Cannon, "so much confusion in the office that you couldn't conduct an intelligent investigation." (Tr. 109) Before Greely voluntarily left however, after having voluntarily accompanied the officers to their office, he in an ostensible further demonstration of his spirit of cooperation, voluntarily permitted the police to take polaroid photographs of his visage. (Tr. 113-115)/3

/3 As footnote 4 at page 9 of appellant's brief indicates, "these pictures have been made part of the record on appeal by stipulation between both counsel." We direct the Court to these photographs in conjunction with Greely's testimonial assertions of his dress that day (Tr. 137) as corroborative thereof.

7. Marion Miller Treadwell

Mrs. Treadwell testified that she was the Director of Program Development for Pride, Incorporated and that Mr. Greely was employed by her organization on May 2, 1968. She responded to the situs of the confrontation between Mr. Greely and the police, but by the time she had arrived Greely had already gone. She learned from a police officer still on the scene however, that he probably was in the Homicide Division. She proceeded to that location directly. Her further testimony was precise because she jotted down notes contemporaneously with her appearance at headquarters. (Tr. 16-19) when she went in to the homicide office she saw Mr. Greely in the back thereof with two men. When she inquired about him a man came up to her and advised that Mr. Greely was not under arrest. She then turned and called into the room, "Ernie, you are not under arrest. You do not have to answer any questions." (Tr. 20) At that point Detective Bernard Crooke left Greely's side, came up to the witness and said "you can't come in here and say anything to anybody that we are talking to." (Tr. 21) She advised him that Greely was not supposed to be under arrest.

> "He said, 'No, he is not under arrest.'
> I said, 'If he is going to be questioned
> I would like to call an attorney.'
> He said, 'There is no need for an attorney to be in this questioning. Ernest
> Greely is not under arrest.' " (Tr. 21)

Detective Crooke then advised Mrs. Treadwell that she would have to wait in a side room if she wanted any information because the responsible person was then on the phone. After sitting there for 15 minutes she went to the front desk to inquire of the female secretary as to the status of things. At this point the same unidentified man who told her that Greely was not under arrest stated that she would just have to wait. A short time later she observed a camera man walk in and he, Greely and two detectives proceeded into another room. After Greely came out of the room he walked over to the witness who asked him whether he had given the police permission to take his picture. He told her no. She then went over to the group of detectives and inquired of them whether Greely had given his permission to have the photograph taken. At that point Detective Robert Boyd told her that they didn't have to ask anyone for permission to take his picture, even though the person was not under arrest. As she jotted down her notes, the unidentified man came up to her and now identified himself as Captain Weber, in charge of the homicide unit. This upset the witness because of the runaround she had been given, even though the head of the unit was present all of the time. (Tr. 21-25)

She then had a conversation with Captain Weber who stated in response to her question as to why a lawyer

could not be present, "Well, there was no need for that because it was not official questioning." (Tr. 26) As to why Greely was not asked for permission to take his picture, Captain Weber responded, "Well, that is sort of a technicality...but I am sure Mr. Greely didn't mind." (Tr. 27) Captain Weber also stated that Greely had not been arrested on the street but had been invited to come along by the officers so that they could speak with him about the liquor store murder, to which request Greely had replied "certainly." (Tr. 27) To which Mrs. Treadwell replied: "Come on. These guys just don't say, 'certainly, I would like to go down and be questioned about murder.' " (Tr. 27) At that point she left the office after having been there 45 minutes to an hour.

Mrs. Treadwell was not cross-examined by the prosecutor. (Tr. 28)

8. Ernest Matthew Greely

Mr. Greely testified that he had been working with a group from Pride, Inc. on May 2, 1968, consisting of from 12 to 15 other men. Their ages ranged from 21 up to about his age, which was 29. He testified that he first observed a patrol wagon circle the block which was joined by a scout car. Officers emerged and apparently called over to the group to stop. They kept walking at which time Officer Minogue went over and made

a general inquiry for identifications. Greely was the closest one to him at the time and asked of the officer why he wanted to see i.d.'s. When the general question was now directed to Greely he responded with his own demand to see the officer's identification. After Minogue got agitated over this unfruitful dialogue he pressed for Greely's i.d. and the latter showed it to him. The officer wrote down the information and then made a radio call which apparently resulted in the appearance of other squad cars along with the homicide cruiser containing Detectives Cannon, Crooke and Boyd. At that time Minogue walked over to the homicide men with Greely's identification. Greely stated that one Elmore Jackson who worked for the U.P.O. also exhibited his i.d. After Minogue conversed with the homicide detectives for a few minutes they called Greely over to their car. (Tr. 123-127) The following dialogue occurred:

> "Greely, we had an anonymous phone call that you have been -- that you were involved in a robbery-murder.
>
> So I said, 'No I don't know anything about it,' just like that.
>
> So he said, 'Well, we going to take you down to the precinct for some witnesses to look at you.'
>
> And that was that. He said, 'We are taking you down,' then they opened the door and I got in the car." (Tr. 127)

Greely was further of the impression -- based upon prior experience with the police -- "it was either get in there or get wooped, one of the two." (Tr. 128) He felt under arrest when his identification was taken because "I couldn't go where I wanted to go. I couldn't have left if I wanted to leave." (Tr. 128-129) He got in back of the police vehicle with one man on either side of him and the third driving.

> "After I got to headquarters, the same one that told me of the anonymous phone call, he told me the same thing, like he was talking kind of rough to the other detectives who was telling me like about people being caught in a situation where they don't know what is going to happen, he said that he was a nice guy and told me that he thought I could help myself and I started to tell him I don't know anything about it and he asked me where was I, and I told him where I was that day." (Tr. 129-130) (Cf. Miranda v. Arizona, 384 U.S. 436 (1966) at page 452 describing the friendly-unfriendly or the "Mutt and Jeff" Act.)

He also described when Mrs. Treadwell came to the homicide squad office and how she was cut off by the officers. (Tr. 130)

> "Q. Now after you saw Mary Treadwell, why didn't you get up and leave the office?
>
> A. I couldn't get up. I was under arrest as far as I was concerned. As far as I know I was under arrest.
>
> Q. And what happened after Mary Treadwell came?
>
> A. Then two detectives, they took me off into another little room and took the two pictures of me.

Q. Before they took the pictures, did they say, 'Mr. Greely, we would like to take some pictures of you?'

A. I think they told me to stand over there by the wall and aimed the camera and took two pictures of me." (Tr. 130)

After the pictures were taken he heard for the first time that he was not under arrest and free to go.

"Like when I heard that I said something and picked up my identification and walked on out.

. . . .

Q. What did you say when you heard that?

A. I think I said something that was kind of profane at that time." (Tr. 131)

Mr. Greely described his dress on May 2, 1968, as follows:

"I had on a black raincoat, a plaid shirt with an olive background, olive pants and with brown shoes and rust-colored cap....

Q. Did you have any orange sweater on?

A. I didn't have on any sweater." (Tr. 137)

After the testimony and arguments were concluded the Court orally granted the defense motion to suppress the identification of Mr. Scott. (Tr. 155) The Court also ruled that the government failed to carry its burden in demonstrating that the in court identification had a basis independent of the taint. (Tr. 156) The following then occurred.

"[The Prosecutor:] I think that notwithstanding the fact that Crump wasn't here, we heard testimony and the same ruling should apply to Mr. Crump.

The government has the burden in these proceedings to carry that burden.

The Court: If this is in fact an identical set of circumstances then I feel the government does have the burden.

[The Prosecutor:] The photographs we all know were taken as the circumstances show, so I would think that the same circumstances--

Mr. Palmer: There is no question in my mind -- I know that they showed Crump only two pictures. I think it is pretty clear.

[The Prosecutor:] I think for the purposes of the record that we can assume that is true, to get an entire ruling on the case, Your Honor.

The Court: Then that would be the Court's ruling." (Tr. 157)

Accordingly, the Court's written order of September 3, 1968, suppressed the identifications of both Mr. Scott and Mr. Crump.

It is also noted that at no time in support of its burden to show an in court identification independent of the tainted viewing did the government show, either testimonially or by way of a proffer, that there were <u>any</u> circumstances corroborative of the identifications. Accordingly we may infer that there are no items such as fingerprints, recovery of a weapon, clothing or the like to tie Ernest M. Greely into the crimes at issue.

ARGUMENT

I. THE DISTRICT COURT'S FINDING THAT APPELLEE WAS IN FACT ARRESTED ON MAY 2, 1968, AND THAT THAT ARREST LACKED PROBABLE CAUSE, WAS BASED UPON A DETERMINATION OF WITNESS CREDIBILITY WHICH IS NOT SUBJECT TO APPELLATE REVERSAL UPON THE COLD RECORD.

In limine we wish to point out that the judgment of the court below, like the verdict of a jury in behalf of the government, must be sustained if there is substantial evidence to support it taking the view most favorable to the defendant. It is not the function of an appellate court 'to weigh the evidence or to determine the credibility of witnesses." Glasser v. United States, 315 U.S. 60, 80 (1942). We are constrained to thus state the obvious because the government's brief at various points fails to adhere to this basic tenet of appellate review. Whether this is due to the fact that the government in a criminal appeal normally defends a conviction and itself relies upon Glasser, supra, is of no real moment, the fact of the matter remains that in this atypical appeal the favorable angle of vision is reserved to the defendant. /4

/4 Examples of appellant's strained view of the record appear at footnote 5 of its brief; and at page 13 thereof along with its citation of Jackson v. United States, 122 U.S. App. D.C. 324, 328, 353 F. 2d 862, 366 (1965) at footnote 6. Its most flagrant "view of the record" abuse appears at page 15 of its brief wherein it is stated: "In the circumstances of this case we feel that neither the pictures taken of appellee on May 2, 1968, nor his testimony describing his clothing

(cont'd.)

Thus, viewing the record in the light most favorable to appellee, we contend that the approach and inquiry by Officer Minogue which resulted in the exhibiting of appellee's identification, along with one or two others, did not amount to an arrest. The right of a policeman under the circumstances at bar to "approach, confront, and interrogate" the appellee have long been recognized by this Court. Bell v. United States, 108 U.S. App. D.C. 169, 280 F. 2d 717 (1960). "The submissiveness, or even fear, engendered in some persons by the mere presence of police officers does not raise a Constitutional issue. That some persons may become nervous or agitated by the approach of a policeman cannot serve as a justification for nullifying reasonable police action." Coates v. United States, No. 22,067, decided April 7, 1969, at slip. op. 4 Cf. Terry v. Ohio, 392 U.S. 1 (1968).

The arrest occurred when the homicide squad detectives ordered appellee into their cruiser which brought

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/4 (cont'd.) when approached by the police, could provide the court below with good cause to disbelieve the cumulated testimony of Scott and Officer Minogue. Appellee is presented in the pictures in such manner that it is impossible to tell definitely whether he is dressed in a sweater. Furthermore his self-serving declaration that he was without a sweater is not only inherently suspect, but also of such insignificant proportion that it could not rationally serve as a basis for discrediting all of Scott and Minogue's testimony." (Emphasis supplied.)

him down to headquarters. Not only is this the logic of an appraisal of the circumstances portrayed by the record, cf. Judge Leventhal's opinion in Bailey v. United States, 128 U.S. App. D.C. 354,361, 389 F. 2d 305, 312 (1967); but it is also the view of the facts argued by defense counsel (Tr. 138-139) and accepted by the trial court.

> "THE COURT: The Court finds that this was not a voluntary act when the defendant entered the car and went downtown...." (Tr. 155)

In its straining to present this Court with an appealable issue, the government's brief appears to state that Officer Minogue's approach signaled appellee's arrest. Brief for appellant at pages 11-14. Although, as indicated, this is clearly not the case, we think it not unlikely that had the trial court credited Minogue and Cannon's testimony to the effect that no arrest had occurred and that appellee voluntered to go to police headquarters, the government would have pressed with some vigor the credibility of its officers and appellee's resultant non-arrest status. Cf. e.g., the brief for appellee in Fuller v. United States, No. 19,532, decided November 20, 1967.

Crediting the defense witnesses, however, the trial court found that an arrest had indeed occurred when Detective Cannon placed appellee in his vehicle and further found that this arrest wanted probable cause. The relevant inquiry thus concerns the state of Cannon's knowledge at that point in time.

One would think that if an experienced homicide squad detective learns from a fellow policeman that two eyewitnesses to a felony murder have unequivocally pointed out the murderer to him, that that experienced officer would forthwith arrest the suspect for so serious a crime. Williams v. United States, 113 U.S. App. D.C. 371, 308 F. 2d 326 (1962); Pendergrast v. United States, No. 21,031 decided January 31, 1969. While the officer's statements are, of course, not determinative of the legal issue involved, his conduct at the critical moment in time reflect, as accurately as anything might, the true state of his knowledge when read in conjunction with the entire record.

> "Probable cause is not a philosophical concept existing in a vacuum; it is a practical and factual matter. A fact which spells reasonable cause to a doctor may make no impression on a carpenter, and vice versa.... An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance ....The question is what constituted probable cause in the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment." Bell v. United States, 102 U.S. App. D.C.383, 386-387, 254 F. 2d 82, 85-86 (1958)

Even though armed with so sensitive a fine tuner for ferreting out putative defendants, Detective Cannon refused to execute an arrest and jeopardize his case. His doubts about the identification flowed in no small measure from his distrust of the accuracy of what he had learned from Minogue. Cf. Tr. 108 Wherein Detective

Cannon verbalizes Minogue's lack of experience in homicide investigations. A natural inquiry turns to the factors of record -- in addition to Cannon's uneasiness over Minogue's abilities -- that would counterbalance the natural impetus toward an immediate arrest of the suspect. Again viewing the record in the light most favorable to appellee, the Court's finding of no probable cause is supported by the following sustaining facts:

1. Crump and Scott on May 2, 1968, were mentally set upon finding a suspect and thus existed the initial danger of their overreacting on the street to a heavy mustached stranger.

2. The inherent danger of misidentifying a heavy mustached stranger who chanced to walk the streets in the vicinity of the crime scene.

3. The fact that Officer Minogue, in a singular demonstration of poor police work, allowed his witnesses to depart without observing the actual arrest or being nearby to confirm that the correct suspect was about to be apprehended. A fact which obviously gave grave concern to Detective Cannon who himself now wanted to see an actual confrontation before he would proceed to effect Greely's arrest. (Tr. 108)

4. The irreconcilable disparity between the clothing of the suspect on the street and what Greely in fact wore on the day in question. This was highlighted by the

appearance of Greely in a homogenous crowd of up to twenty-five other men; some of whom also had heavy mustaches.

Putting the general into a particular version of events -- properly viewing the record -- the Court's ruling is sustained by the following:

The crime itself was a brief episode, confusing to the eye of the viewer by the presence of so many persons scrambling about the store, distracting attention. This is confirmed by the fact that Scott only remembered the assailant as sporting a heavy mustache, black coat, hat, and remembering nothing unusual about his face. It can also be inferred that this witness described the actual assailant shortly after the crime as substantially smaller in height than the appellee actually is. On May 2, 1968, Scott and Crump saw someone on the street whom, from the distance, they both identified as the killer. This man was pointed out to Officer Minogue standing in a group of up to twenty-five other men of similar age, some of whom also had heavy mustaches. The man was fixed in Minogue's mind by his dark tan raincoat and bright sweater. Scott and especially Minogue were certain about this sweater; the latter being pinpointed to the suspect when Scott and Crump exclaimed to him: "That's the one there, in that bright sweater and with that hat and trench coat." (Tr. 92 Emphasis supplied.) At Tr. 94, Minogue was particularly

queried about the suspect's raincoat which he reiterated was dark tan. A break in continuity then occurred when the witnesses were allowed to leave the Officer's presence and proceed to the funeral. Returning to the group of men -- after leaving Scott and Crump off -- Minogue was confronted with several mustached men and received -- contrary to his testimony -- more than one identification card. Greely was singled out because of his hat which was similar to the one worn by the suspect, but notwithstanding this similarity, the remainder of his dress was so demonstrably wrong that it could be found, as a fact, that Ernest M. Greely was not the man pointed out on the street by the witnesses to Officer Minogue. This the trier of fact could do even in the face of Minogue's assertion that it was the same man; for as we understand the law, witnesses can be believed in whole or in part and inferences can be drawn that are reasonably deducible from the evidence. Shelton v. United States, 83 U.S. App. D.C. 257, 259, 169 F. 2d 665,667, cert. denied, 335 U.S. 834 (1948). The all or none principle of credibility seemingly urged by appellant in its brief is a stranger to the fact finding process. The battle lines are not that inexorably drawn and a middle ground can exist composed of the truth as gleaned from both sides. It was this patent disparity of dress which, it can be inferred, caused Detective Cannon

to "hesitate or pause" to arrest appellee after Minogue told him "exactly what [he] had." (Tr. 98) This view of the facts is bolstered by Cannon's attempt to incorrectly create the picture of appellee standing out from a disparate group of teenagers (Tr. 102) and being unable to recall appellee's dress at the time (Tr. 103), although it later turned out that Cannon then possessed two polaroid photographs of Greely which depict his dress on May 2, 1960 (Tr. 113-115) and which, in conjunction with the latter's own testimony as to what he wore that day, destroy probable cause. At page 8, footnote 3 of its brief, the government for purposes of this appeal does not resist the trial court's finding that appellee was arrested on the street on the day in question.

Thus viewing the facts, the trial court's ruling of no probable cause is sustained and the government's reliance on Pendergrast v. United States, No. 21,031, Decided January 31, 1969, is misplaced.

The government can only rely on Pendergrast because of its erroneous view of the record as pointed out earlier which, in topsy turvy bootstrap fashion, has resulted in the postulating of its first argument at page 10 of its brief as follows: "The District Court's conclusion that probable cause was lacking for the arrest of appellee was based on an erroneous view of the law as applied to the established facts."

struck down and thus attempted an alternative procedure. While that procedure succeeded in Fuller, supra, it failed to pass muster here.

II. THE TRIAL COURT'S ORDER OF SEPTEMBER 3, 1968 SUPPRESSING THE EYEWITNESS IDENTIFICATIONS OF SCOTT AND CRUMP IS CLEARLY SUSTAINED BY THE RECORD.

Having established the unlawful arrest of Greely on May 2, 1968, it follows, of course, that the photographs taken of him that day are the direct product of unlawful police conduct and thus non-useable as a link in any evidentiary chain against appellee. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. United States, 371 U.S. 471 (1963); Bynum v. United States, 104 U.S. App. D.C. 368, 262 F. 2d 465 (1958); Adams, et al v. United States, Nos. 20547-9, decided June 21, 1968.

The trial court further found that only showing these two photographs to the witnesses was a further exploitation of the illegality and thus impermissibly tainted the identifications -- in addition to which there existed independently a due process violation created by the exhibition of Greely's photographs alone -- which taint "the government has not proven to have been dissipated by the other factors surrounding the witnesses ability to identify the defendant....," (Trial Court's Order of September 3, 1968) thus resulting in

the suppression of the eyewitness in-court identifications.

The issue is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, supra. As we have demonstrated in Argument I it can be found as a matter of fact from the record that Scott and Crump identified a man other than Greely to Officer Minogue, thus, solely using his picture to fix the identification for all time was a clear exploitation of the illegality and the government did not prove otherwise in discharging its burden. "The springs of conduct are subtle and varied, Mr. Justice Cardozo once observed. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." Harrison v. United States, -- U.S. --, June 10, 1968 at slip op. 5.

As stated in the order of suppression itself, the court was also aided in its conclusions through its personal observations of Mr. Scott while on the witness stand, a factor which this Court cannot possibly independently appraise. We do know as a fact however, that Scott was not able to even identify Officer Minogue as the man he rode with on May 2, 1968.

In an attempt to rebut the trial court's finding that the sole presentation of appellee's picture to the witnesses was a due process violation, appellant gains succor in something styled the "fortuitous community line-up." At brief 18. The argument runs that because Scott recognized Greely in three of these fortuitous community lineups [factual premise], appellant "fails to understand" how the trial court could reasonably conclude that his subsequent viewing of appellee's picture vitiated his reliability that the jury was not entitled to hear his testimony." Brief 18.

Wade v. United States, 388 U.S. 218 was decided June 12, 1967 and Simmons v. United States, 390 U.S. 377 was decided March 18, 1968. Thus, on May 2,1968, the police were alerted by the highest judicial authority -- in addition to the dictates of common sense and fair play -- that a single photographic showup or physical lineup is pregnant with the danger of misidentification. Each case "must be evaluated in light of the totality of surrounding circumstances," Simmons v. United States, supra, to determine whether a due process violation has occurred. In the case at bar Detective Cannon knew that the danger of having picked out the wrong suspect on the street was a real one which in fact led him to forego an arrest. The suspect Greely had been identified by name, job and

home address to the police department and was not thus to be readily lost. The felony-murder had occurred during a brief period of time in a store thrown into confusion by many persons running about in it. It would have been absurdly simple to include other similar photographs in the viewing. Upon this factual predicate the police showed Scott pictures solely of appellee and, as if that was not suggestive enough, prefaced the viewing by telling him that he was about to see "some pictures of the man that me and Crump pointed out to this officer." (Tr. 60) To seriously urge that in the light of the totality of these surrounding circumstances, the trial court erred in ruling that a due process violation had occurred is truly to close one's eyes to reality. This photographic viewing was not needed to obtain leads to a suspect, its tenor, in the circumstances, was instinct with an attempt to bury the one suspect available. As such it can be concluded, as did the trial court, that "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons, supra, at 384. The government's argument fails, of course, because it rests on the erroneous factual premise that the witnesses saw and later identified appellee to Officer Minogue. The Court's ruling is sustained, by reading the record to conclude that they did not point out Greely and that a

different man, in fact, was observed by Scott and Crump. Once the trial court correctly ruled that the photographic viewing was a due process violation, "the presumption is that the in-court identification was the product" thereof. Mason v. United States, No. 21,818, decided June 30, 1969. The in-court identification could be admitted only if the government had established "by clear and convincing evidence that [it was]...based upon observations of the suspect other than the [illegally obtained]...identifications." Mason v. United States, supra, at slip op. 12. Since the record supports the view that Greely was not the man originally identified on the street,and the witnesses thus, identified the wrong man by photograph because of the impermissible police procedures, it can be said here as the Court did in Mason, supra, "since we cannot say that the photographic identification most probably rested on an independent basis, we can hardly find clear and convincing evidence of such an independent source for the subsequent in-court identification." At slip op. 12. A fortiori, when the trial court rules in favor of the defendant on the facts. Cf. The exhaustive en banc treatment of these issues in Clemons, et al v. United States, Nos. 19,846,21,001, 21,249, decided December 6, 1968, wherein it is stated:

> "The Supreme Court has, as noted above, expressly contemplated that in-court identifications may be found capable of standing on their own feet, even though preceded by

deficient pre-trial confrontations. It has also emphasized the key role which the trial court, because of its direct exposure to the witnesses, plays in any such determination." At slip op. 17.

CONCLUSION

WHEREFORE, appellee respectfully requests that the order of suppression appealed from be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was personally delivered to the Office of the United States Attorney this _____ day of August, 1969.

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